LIBRARY
SUPREME COURT, U. S.

FILED
OCT 19 1967
JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 743

BAY COUNTIES DISTRICT COUNCIL OF CARPENTERS, AFL-CIO, and its Agent, C. R. BARTALINI; CARPENTERS UNION LOCAL No. 162, AFL-CIO, and its Agent, E. W. HONERLAH; CARPENTERS UNION LOCAL No. 828, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO; and CARPENTERS UNION LOCAL No. 1408, AFL-CIO, and its Agent, JACK WEARE,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

LEVY, DEROY, GEFFNER AND VAN BOURG,
By VICTOR VAN BOURG,
45 Polk Street, San Francisco, California 94102,
Attorneys for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Citations and opinions below	2
Jurisdiction	2
Question presented	2
Statement of the case	3
A. Findings and conclusions of the National Labor Relations Board	3
B. Conduct of petitioners	6
C. Decision of the court below	6
Reasons for granting the writ	6
Conclusion	13

Table of Authorities Cited

Cases	Pages
Bay Counties District Council of Carpenters, AFL-CIO, et al., 154 N.L.R.B. 1598 (1965)	2
Hod Carriers Local 645, 144 N.L.R.B. No. 978 (1963)	8
Houston Insulation Contractors Asso. v. N.L.R.B., ____ U.S. ____, 18 L.Ed.2d 389	6, 7
Los Angeles Mailers Union No. 9 v. N.L.R.B., 311 Fed.2d 121 (CA DC 1962)	8, 9
N.L.R.B. v. Allis-Chalmers Mfg. Co., ____ U.S. ____, 17 L. Ed.2d 681	7
National Labor Relations Board v. Bay Counties District Council of Carpenters, AFL-CIO, et al., ____ Fed.2d ____ (CA 9, July 21, 1957)	2
N.L.R.B. v. News Syndicate Co., 365 U.S. 695	11
National Woodwork Mfrs. Asso. v. N.L.R.B., ____ U.S. ____, 18 L.Ed.2d 357	7
Teamsters Local 386, 152 N.L.R.B. No. 83 (1965)	8, 10
Teamsters, Local 413 v. N.L.R.B., 334 Fed.2d 539 (CA DC 1964)	7, 8, 10
Teamsters Local 695, 152 N.L.R.B. No. 55 (1965)	8
Teamsters Local 696, 149 N.L.R.B. No. 3 (1964)	8

Codes	
Labor Code, Section 1115	11

Statutes	
28 U.S.C. 1254(1)	2
National Labor Relations Act of 1947, as amended (29 U.S.C.):	
Section 8(b)(4)	8
Section 8(b)(4)(i)	4, 5
Section 8(b)(4)(ii)(a)	4
Section 8(b)(4)(ii)(B)	5
Section 8(b)(7)(C)	5
Section 8(e)	3, 4, 5, 6, 7, 8, 12
Section 10(b)	12

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No.

BAY COUNTIES DISTRICT COUNCIL OF CARPENTERS, AFL-CIO, and its Agent, C. R. BARTALINI; CARPENTERS UNION LOCAL No. 162, AFL-CIO, and its Agent, E. W. HONERLAH; CARPENTERS UNION LOCAL No. 828, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO; and CARPENTERS UNION LOCAL No. 1408, AFL-CIO, and its Agent, JACK WEARE,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioners Bay Counties District Council of Carpenters, AFL-CIO, and its Agent, C. R. Bartalini;

Carpenters Union Local No. 162, AFL-CIO, and its Agent, E. W. Honerlah; Carpenters Union Local No. 828, United Brotherhood of Carpenters & Joiners of America, AFL-CIO; and Carpenters Union Local No. 1408, AFL-CIO, and its Agent, Jack Weare, pray that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Ninth Circuit, enforcing an order of the National Labor Relations Board.

CITATIONS AND OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, *National Labor Relations Board v. Bay Counties District Council of Carpenters, AFL-CIO, et al.*, ... Fed.2d ..... (CA 9, July 21, 1967), enforced *Bay Counties District Council of Carpenters, AFL-CIO, et al.*, 154 N.L.R.B. 1598 (1965). The opinion of the Court of Appeals is set forth as Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals ordering that the order of the Board be enforced was entered on July 21, 1967. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a clause in a proposed collective bargaining agreement which has no unlawful language on its

face can be deemed "per se" violative of Section 8(e) of the National Labor Relations Act of 1947, as amended (29 U.S.C.), without any evidence of any unlawful conduct whatsoever. The clause in question provides:

> "No employee covered hereby may be discharged by an individual employer for refusing to cross a picket line established by an International Union affiliated with the Building and Construction Trades Department of American Federation of Labor, or a Local Union thereof, which picket line has been authorized or sanctioned by the Local Building and Construction Trades Council having jurisdiction over the area in which the job is located and after the individual employer involved has been notified and has had an opportunity to be heard. Said notice shall be in writing and mailed to the individual employer at his address. This Section shall not apply to jurisdictional disputes."

STATEMENT OF THE CASE

A. Findings and Conclusions of the National Labor Relations Board.

The basic facts of this case are not in dispute. The petitioner referred to herein as the District Council is made up of constituent local unions which negotiate area-wide collective bargaining agreements. The petitioning unions were joined as respondents in the case below. Wilbur Disney operated three commonly owned businesses in the geographical jurisdiction of the district council and had been signatory to the

Carpenters Master Agreement which contained the clause referred to above. Disney subsequently refused to sign a renewal to said Master Agreement, which the unions claimed he was bound to. Nevertheless, he continued to conform his labor policies to the Agreement and continued to make contributions to welfare, pension and vacation funds, provided for in the Agreement. The union never attempted to enforce the clause in question.

In order to obtain Disney's signature on the newly negotiated contract the unions commenced picketing—the clause in question here had been in prior agreements for many years and was not a question in this activity nor was it discussed or protested by Disney.

Insofar as this appeal is concerned, the National Labor Relations Board also found that the petitioners violated Section 8(b)(4)(i) and (ii)(a) by engaging in picketing activities directed toward Disney and conditioning the cessation of picketing upon Disney signing a collective bargaining agreement containing the clause above mentioned which the Board concluded was *per se* violative of Section 8(e)[1] of the

[1]Section 8(e) provides:

"(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work

National Labor Relations Act, as amended, even though no evidence whatsoever was introduced to show unlawful conduct with respect to the clause. Similarly there was no showing that the collective bargaining parties who negotiated the clause intended its enforcement in an unlawful manner.

The National Labor Relations Board refused to adopt certain other findings and conclusions of the Trial Examiner regarding other alleged violations of Section 8(e) and of Section (8)(b)(7)(C). Petitioners concede that the conduct directed toward other employers because Disney was working on a job was violative of Section 8(b)(4)(i) and (ii)(B), and therefore the only issue presented to the Court at this time is whether or not the language of Section XXI-A is *per se* violative of Section 8(e) of the Act, and whether conduct to obtain assent to this language is consequently violative of other provisions of the Act.

---

to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b)(4)(B) the terms 'any employer', 'any person engaged in commerce or an industry affecting commerce', and 'any person', when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception."

B. Conduct of Petitioners.

Since there is no conduct in the record relevant to this issue, a violation of the Act can be found *only* if the language of the clause is found to be *per se* violative of Section 8(e). Petitioners contend that the application of the *"per se"* method of interpreting the clause *presumes* that petitioners intended an unlawful result. Such a presumption is not called for by statute.

C. Decision of the Court Below.

The Court of Appeals for the Ninth Circuit enforced the order of the National Labor Relations Board in its per curiam opinion, wherein it stated that the critical language of Section XXI-A, *although differing from language in other cases,* had the same purport as cases already decided by that Court and by the Court of Appeals for the District of Columbia Circuit.

REASONS FOR GRANTING THE WRIT

The question of whether or not the protection of an individual member's right to refuse to cross a picket line without the possibility of discharge by his employer has never been decided by this Court. Although the Court has denied certiorari in the past in cases presenting a similar problem, petitioners do not believe that it has been presented in context of this case, which must be viewed in the light of the recent decisions rejecting the mechanical *per se* violation approach (see *Houston Insulation Contractors Asso.*

v. N.L.R.B., ... US ....., 18 L.Ed.2d 389; *National Woodwork Mfrs. Asso. v. N.L.R.B.*, ... US ....., 18 L. Ed.2d 357; *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, ... US ....., 17 L.Ed.2d 681).

1. The letter and spirit of Section 8(e) of the National Labor Relations Act is not violated by contractual language which would forbid an employer from discharging an employee, but which does not prohibit other discipline of that employee, for refusing to cross a picket line which met standards of legality. The employer does not thereby cease or refrain or agree to cease or refrain from dealing with any secondary employer or person.

It was held in *Teamsters, Local 413 v. N.L.R.B.*, 334 Fed.2d 539 (CA DC 1964) that a clause of a collective bargaining agreement was violative of Section 8(e) of the Act where it provided:

> "It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a labor dispute or refuses to go through or work behind any picket line, including the picket line of Unions party to this Agreement and including picket lines at the Employer's place or places of business" (p. 542).

It was held that insofar as this language sanctioned a refusal to cross a picket line which constituted a secondary strike or boycott, it would then be authorizing a secondary strike and would *"pro tanto"* be void under Section 8(e) of the Act. This case rejected,

as did *Los Angeles Mailers Union No. 9 v. N.L.R.B.*, 311 Fed.2d 121 (CA DC 1962), the argument that such a clause protected an individual refusal to cross a line rather than Union-induced refusal. That Court did hold, however, that the clause was valid insofar as it upheld an employee's right to refuse to cross a picket line in connection with a primary dispute at the contracting employer's premises or where the conditions expressed in the proviso to Section 8(b)(4) were present at a picket line of the premises of another employer. This Court denied certiorari in the *Teamsters Local 413* case, *supra*.

The clause in the instant case is distinguishable from the provision in the *Teamsters Local 413* case in many instances as it is from all of the reported cases which petitioners have been able to find. The Court's attention is drawn to the fact that in the *Teamsters Local 413* case, *supra*, as in *Teamsters Local 386*, 152 N.L.R.B. No. 83 (1965), *Teamsters Local 695*, 152 N.L.R.B. No. 55 (1965), *Teamsters Local 696*, 149 N.L.R.B. No. 3 (1964), *Hod Carriers Local 645*, 144 N.L.R.B. No. 978 (1963), the collective bargaining language which was held to be violative of Section 8(e) of the Act provided *in each instance* that an employee who refused to cross a picket line was to be immune from *any sort of discipline*, including discharge. The contractual language in issue in this case, however, simply guarantees that the employee will not lose his job. The employer in this case may impose any other kind of discipline short of discharge without violating this contractual language, and the clause

further excludes jurisdictional strikes from any protection whatever—under these circumstances it is clear that the Board and the Court below did not look either to intent or to reality, but placed a mechanical construction upon the language applying an unwarranted presumption of unlawful motive or assuming potential, but not actual, unlawful application.

Thus, under the instant clause an employee does not have an absolute right to cross a picket line under the quoted language as an employee would in any of the cases decided heretofore. Therefore if it is true that when an employer, pursuant to a collective bargaining agreement, gave his employees the right to respect any picket line with impunity the provisions of Section 8(e) were violated, then this clause is clearly distinguishable in the instant case, *for an employee does not have total immunity* when he refuses to cross a picket line and stands behind his convictions to the point of paying for them by making himself vulnerable to any disciplinary action short of losing his job.

Unions have argued, unsuccessfully in the past, as in *Los Angeles Mailers Union No. 9 v. N.L.R.B., supra,* that clauses granting total immunity from any disciplinary action were protecting individual refusals, not Union-induced refusals, and thus were not within the Act. That argument, however, does have validity in this case where it clearly becomes the individual's decision to cross or not to cross a picket line and where he must take the individual responsibility and place himself in jeopardy of some discipline as a result of his decision.

2. Since no proof or evidence of intent of the contracting parties or even of Union conduct directed toward enforcing Section XXI was offered to support the Board's interpretation that it is an illegal contractual clause, Section XXI-A therefore must be determined by its terms as *per se* illegal in order for the order of the Board to be enforced. Petitioners contend, however, that the language herein involved is not *per se* violative of the Act. It should be noted that the subcontracting clause which was held by the Trial Examiner to be violative of the Act was upheld by the Board. The National Labor Relations Board refused to read that clause as being applicable to non-jobsite work. The National Labor Relations Board gave the subcontracting clause the benefit of a doubt which it refused to give this "protection of rights clause". Instead, the Board chose to infer illegality based upon what was not contained in the "protection of rights clause" or what the Board thinks should be added to the clause (Section XXI-A). It was made clear in *Teamsters Local 413 v. N.L.R.B., supra,* and *Teamsters Local 386 v. N.L.R.B., supra,* that the similar, but not identical, clauses therein involved were deemed legal insofar as they involved primary disputes either at the contracting employer or a secondary employer meeting the conditions of the Section 8(b)(4) proviso. Thus this generic type of clause is illegal only when it pertains to protecting the individual's rights to refuse to cross an unlawful picket line. On this slender thread hangs the decision of the N.L.R.B. and the order of the Court of Appeals. Had the Union draftsmen in preparing Section XXI-A inserted the

magic word "lawful" before the term "picket line", this case would not be before the Court at this time, for no action would have been taken by the National Labor Relations Board in the first instance. Therefore, the National Labor Relations Board and the Court of Appeals have assumed that because the word "lawful" does not appear, the petitioners intend that the section be applied to unlawful picket lines. This presumption is not consonant with the law set forth by this Court when it noted:

> "Finally, as we said in *Local 357, IBTCW&H of A v. N.L.R.B.*, decided this day, 6 L.Ed. 2d 11, *we will not assume* that unions and employers will violate the federal law, favoring discrimination in favor of union members against the clear command of this Act of Congress. As stated by the Court of Appeals, 'In the absence of provisions calling *explicitly* for illegal conduct, *the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.*' 279 Fed.2d at 333." *(N.L.R.B. v. News Syndicate Co.,* 365 US 695.) (Emphasis added.)

Thus the National Labor Relations Board and the Court of Appeals in this and in other cases have violated the mandate of this Court by assuming that the unions involved meant to violate the law by failing to affirmatively disclaim all illegal objectives. In the instant case, petitioners did in fact disclaim illegal objectives by deleting from the "protection of rights clause" (Section XXI-A) any application to jurisdictional disputes or strikes. Under the Act and under California law (California Labor Code Sections 1115,

et seq.), jurisdictional strikes are illegal. Thus the unions did manifest an intent that this clause have only lawful application. Nonetheless, the National Labor Relations Board and the Court of Appeals chose to overlook this expression of intent and penalize petitioners not for what was said but for what was left unsaid.

3. As was noted above, the subcontracting clause of the same agreement did not expressly limit itself to application on the jobsite and thus come within the provisions of Section 8(e), but nonetheless the Board and the Court of Appeals found that the Collective Bargaining Agreement involved here was by its terms, its meaning, its history and the employer's business limited to "construction site applicability." There is no rational reason for refusing the protection of rights clause the same interpretation.

4. Petitioners contend that although it might have been found that the unions violated Section 8(b)(4) of the Act by picketing in order to force Disney to sign the contract, it could not have violated Section 8(e) of the Act if indeed Section XXI-A is illegal, because the employer, Disney, did not execute the Collective Bargaining Agreement. Furthermore, it does not appear from the National Labor Relations Board's opinion that any employer and the petitioners executed the Master Agreement with Section XXI-A included therein within the six months' period of limitations set forth in Section 10(b) of the Act, or that it was effectuated within that limitation period. There is no evidence that a violation of Section 8(e) was committed.

CONCLUSION

It is therefore respectfully requested that the decision of the Court below be reversed and that the Board's order be denied enforcement.

Dated, San Francisco, California,
October 16, 1967.

LEVY, DEROY, GEFFNER AND VAN BOURG,
By VICTOR VAN BOURG,
Attorneys for Petitioners.

(Appendices A, B and C Follow)